Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

BOOK REVIEWS

THE RELATION OF CUSTOM TO LAW, by Gilbert T. Sadler. (London: Sweet & Maxwell, Limited, 1919, pp. 86.)

"The theme", as the author says in the Preface, "is one which goes to the very centre of jurisprudence, as the science of law in States". The critics of the analytical school of jurisprudence point to the fact that customs are enforced by the courts as a refutation of the doctrine of Austin and his successors that "every positive law obtaining in any community, is a creature of the Sovereign or State".[1] Mr. Sadler defines a law as "a rule which the sovereign enforces by sanctions"; but his analysis of the relation of custom and law involves a denial that laws are "set" by the sovereign, a position that is inconsistent with a fundamental proposition of analytical jurisprudence.

The following extracts give a summary of the main points brought out in the book: "Instincts, interpreted by reason, * * * have created custom." "Thus the instinct of *self-preservation* led to the rules for reprisals between individuals and between States." "Customs of marriage arose from the *sex-instinct*, as interpreted by reason." "Customs have arisen in two ways; either by a people repeating certain acts till they become habitual, or by some popular authority making decisions in cases voluntarily brought before him." "In interpreting the custom, the popular arbitrator often slightly alters it, and so makes a new custom." "By popular authorities are meant leaders who, from their manifest learning in the customs of a society, are looked to spontaneously by a people as voluntary judges or arbitrators or guides." "They may act in a State, an immature State * * *. Generally, however, such popular authorities have acted in societies which have had no central coercive authority, societies which were not yet States in the modern acceptation of the term." "Customs in a primitive society without any central coercive authority are not laws." It is only "when the society in which such customs exist becomes a *State*, with a central coercive authority," that law arises. Also, "it must be clearly borne in mind that not *all* customs become laws." It is the process by which some customs become laws that is the crucial question for jurisprudence. On this the writer says: "Judges [of the State] practically *must* recognize some customs as laws, if a people are to be governed, and a revolution prevented." "The recognition or ratification of customs as laws of State is not a matter of caprice. The judge is guided by certain principles which have grown up in history, by the existence of certain marks or characteristics in the custom." These marks are given as ancient, reasonable, etc. "When a society in which such customs exist becomes a *State*, with a central coercive authority, such customs as have certain marks *become at once law*, because they *will* be recognized as law, should occasion require." To the same effect is Sal-

[1] 2 JURISPRUDENCE, 4th ed., 550, 551.

mond, who is quoted as follows: "Custom is not law because it *has been* recognized by the courts, but because it *will be* so recognized, in accordance with fixed rules of law, if the occasion arises."[2] Mr. Sadler thus maintains that "customs which *will be* recognized by a judge are already law."

It is not necessary to discuss here the value of the explanation given of the origin of custom, or even of the theory that its origin is anterior to that of the State. It is a fact that custom in its origin is without connection with the State, but that some customs come to be enforced by the courts of the State. The thesis that customs having certain marks are law before enforcement by the courts, merely because they will be so enforced, considered as a proposition of jurisprudence, is erroneous. For jurisprudence properly so called means analytical jurisprudence, which, as formulated by its most prominent American exponent, W. W. Willoughby, conceives of the State as a sovereign legal person that expresses and executes its will (law) through the bodies and persons in which it is organized (government).[3] The State, acting through its governmental organs, is thus the sole source of law. Now, if the judge recognizes that a given custom *was* law at a certain time in the past, then he cannot be creating law by that act, but merely stating what the law is, and was. There would then be law which was not the will of the State, because only that can be the will of the State which the latter has by some definite act of its agent (government) expressed as such. The fact that some customs have certain marks that will cause them to be enforced by the State is, juristically speaking, nothing more than the statement that they will be law, not that they are law before the State acts. The creation of a rule of law requires some express or implied wilful choice on the part of the State through its organs. The actual enforcement of a custom implies such a choice; its potential enforcement does not. This is but stating in terms of analytical jurisprudence what should be clear to every lawyer: that there can be no law without some sort of action by the State.

The real relation between law and custom is that the act by which a court first accepts a custom and enforces it is an act of legislation. It is a case of a retroactive law, a law enacted by the court after the fact and applied to events that transpired prior to the judicial legislation.[4] As Austin said, "Now, till the legislator or judge impress them with the character of law, the custom is nothing more than a rule of private morality."[5] In Austin's analysis, however, since the courts are not considered the determinate body which is sovereign, resort must be had to the fiction that what the sovereign permits he commands, to make the action of the courts impliedly that of the sovereign.[6] But the correct view of the State makes sovereignty inherent in the abstract legal person that is termed the State, while the *exercise* of sovereignty may

[2] JURISPRUDENCE, 157.
[3] WILLOUGHBY, NATURE OF THE STATE.
[4] WILLOUGHBY, NATURE OF THE STATE, 169ff.
[5] 1 JURISPRUDENCE, 37.
[6] BROWN, AUSTINIAN THEORY OF LAW, §§ 97ff.

be divided up among various organs of government.[7] This view of sovereignty makes it possible, in cases where the courts are co-ordinate branches of government owing their powers directly to a rigid constitution, to consider them in recognizing custom as the direct legislative organ of the State. Where they are subordinate to another branch of the government, they may be considered as acting as its agent. In each case their power to recognize custom is apt to be an implied power. The idea of an implied power in the particular matter is perhaps better than the wider statement that what the sovereign permits he commands.

To this analysis may be urged the objection that it is based on the doctrines of analytical jurisprudence, which is considered by many writers as if it were manufactured by abstract theorists. The political pluralists like Harold J. Laski[8] criticize it on the ground that it does not correspond with the facts of State life, or that its principles are not ethically justifiable. Such criticism is, however, due to ignorance of the aim and function of the system criticised. That system does not claim to explain the sociological origin or the metaphysical justification of the State. It is a purely formal science which attempts to discover, set forth and harmonize the principles implicit in the legal systems of modern States. In these States are to be found systems of government enforcing on the members of the community certain rules of action. The principles on which this enforcement proceeds it is the task of jurisprudence properly so called to formulate and correlate; and these principles find a very convenient unifying element in the conception of the State as a legally omnipotent personality acting through governmental organs in the expression and enforcement of law, which is law because it is the expressed will of the State, and for no other reason. If in carrying these implicit principles to their logical conclusion jurisprudence departs from the sociological facts, as when it attributes unlimited power to the State, this means that there is a valid distinction to be drawn between what Dean Pound has called "Law in books" and "Law in action",[9] but it does not mean that "Law in books" is useless. In fact, its usefulness consists in the very fact that it isolates the ideas of the law and states them with logical exactness. In so far as its conclusions have been stated as facts or as moral principles, there is room for criticism. But while Sir Henry Maine is correct in comparing Austin's method to that of the economist who explains all economic action in terms of the economic motive, without considering other motives that influence men,[10] yet even this is not the method to be employed by the jurist, who is to consider only the law and its principles, leaving it to the sociologist to trace their connection with the facts. Once this is thoroughly understood, it is clear that the only valid methods of overthrowing the doctrines of jurisprudence are either to show that they do not accurately state the principles of the law, or, admitting their present validity, to so change the law that they will no longer be applicable.

---

[7] WILLOUGHBY, NATURE OF THE STATE, 142ff.
[8] LASKI, AUTHORITY IN THE MODERN STATE, ch. I.
[9] 44 AM. LAW REV. 12.
[10] EARLY HISTORY OF INSTITUTIONS, Lectures XII and XIII.

The above discussion has gone on the assumption that at the time customs were first enforced by the courts the principles of jurisprudence, as we know it to-day, were applicable. But even if they were not, Mr. Sadler's theory is untenable. For, in the first place, customs could not become law in the meaning of that term as the will of a sovereign State before such a State came into existence. When such a State comes into existence, that is, when the basic principles of the law become what they are at present, either the customs have been so long enforced that they may be assumed to be a part of the constitution of the State itself, or else they are not, juristically speaking, law until they are enforced by the courts. They cannot be law merely because their characteristics are such that they will be enforced by the courts of the State. So in any event the theory of the relation of custom to law offered in this book, which is substantially that of Salmond and of Hammond,[11] has no place in the modern science of jurisprudence, however true in fact the statements with regard to customs may be.

JAMES HART.

AN INTRODUCTION TO AMERICAN LAW, by Roscoe Pound. (Cambridge, Mass.: Dunster House Bookshop, 1920, pp. 44.)

This little pamphlet consists of the outline of a course of lectures which Dean Pound, of the Harvard Law School, delivered before the Boston Trade Union College during the spring term of 1919, and should be of interest to a wide circle of readers. Dean Pound makes no attempt to make every man his own lawyer or even to tell him how to know when he needs a lawyer. The approach is much more philosophical. The lectures seek to orientate American Law in the development of jural science and to indicate the manner in which it effects "an adjustment of human actions and relations in order to conserve the goods of existence, prevent friction in human use and enjoyment of these goods and eliminate waste of them."

The subjects discussed are "Fundamental Conceptions", "History of the Common Law", "The Common Law in America", "Sources and Forms of Law" and "System of the Common Law". It would be a good thing if the content of Dean Pound's lectures could be made a part of the courses which are now offered on "Elementary Law" and "Commercial Law".

---

[11] ELEMENTS OF JURISPRUDENCE, 6th. ed., 54-55.